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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND FRANKS, Defendant and Appellant.	A104441 (Alameda County Super. Ct. No. 145147)

A jury convicted defendant Raymond Franks of four sex abuse counts committed against two minor stepdaughters. The trial court sentenced him to 18 years in state prison. Defendant contends that his conviction and sentence resulted from procedural, evidentiary, instructional, and sentencing errors. Although we hold that the judgment included a no-contact order that requires modification on remand, we affirm the judgment in all other respects.

I. BACKGROUND

Defendant was charged by amended information with one count of committing continuous sexual abuse of A.M., a child under the age of 14 (Pen. Code, § 288.5, subd. (a); count one), two counts of committing lewd and lascivious acts on A.M. (Pen. Code, § 288, subd. (c)(1); counts two and three), and one count of committing a lewd and lascivious act on Ashlee O., a child under the age of 14 (Pen. Code, § 288, subd. (a); count four). The amended information further alleged that defendant suffered four prior felony convictions and had served two prior prison terms.

Defendant pleaded not guilty and denied all the allegations. Jury trial commenced on August 13, 2003.

A. Prosecution Case

1. Counts One Through Three

A.M. moved in with her mother, Audrey, her brother, Samuel M., and defendant, her stepfather, in July 2000, about a week after she turned 13 years old. They lived in a two-bedroom apartment on East 18th Avenue in Oakland.

A few months after moving in, A.M. fell asleep listening to music on the living room floor. Her mother was out of the house and her brother was asleep in another room. A.M. was awakened by defendant massaging her chest over her pajama top. He lifted her top and bra and fondled her chest with his hand and sucked her bare breast. A.M. was scared and pretended to be asleep.

A.M. and her mother testified about a second incident that occurred in the East 18th Avenue apartment before A.M. turned 14. Defendant entered A.M.'s bedroom at night. He fondled her breast outside of her pajamas, then moved her bra to the side, touched her bare breast, and sucked her nipple. Audrey awoke that night and noticed that defendant was not in bed. Concerned about A.M.'s safety, she got out of bed and began looking for defendant. She looked in the bathroom and kitchen-living room area, but did not see him. She stood in the doorway of the children's bedroom and looked in. She could see the window straight ahead, but could not see to the left where the children's bunk beds were. She did not see anyone standing at the window. Audrey sat down in the bathroom where she could observe someone coming out of any of the rooms. She saw defendant come out of the children's room, and asked him what he was doing. He said, "I was closing the bedroom window." Audrey entered A.M.'s bedroom, asked her why she was awake, checked her heart rate, and told her to go back to sleep.

A.M. testified to a third incident that occurred before her 14th birthday. A.M.'s mother and brother were asleep in their bedrooms. She fell asleep on the couch. Defendant walked into the living room and rubbed her chest outside and possibly under

her pajamas. He also propped her leg up, pulled down her pants and underwear, and rubbed her vagina with his hand.

A.M. could not recall in detail any other incidents that occurred before her 14th birthday, but she testified that defendant would put his hands on her chest four or five times per month and that he touched her vaginal area once or twice per month, always while she was sleeping.

A.M. recalled two specific incidents that occurred after her 14th birthday. In one, defendant touched and sucked her nipples, pulled down her pants, and orally copulated her after she had fallen asleep on the couch. A.M. recalled a final incident after the family had moved to a residence on 66th Avenue in which defendant approached her as she was sleeping in her bedroom. He pulled down her pants and underpants, and orally copulated her. A.M. testified that, besides these two molestation incidents, there were "too many [others] in between" for her to remember.

Audrey asked A.M. numerous times if defendant had inappropriately touched her, but A.M. was afraid to tell her mother and always denied it. She did tell her brother and a friend that defendant was molesting her. On February 6, 2003, A.M. reported the molestations to her church pastor who contacted the police.

2. Count Four

In June 2002, Audrey's 11-year-old daughter, Ashlee O., moved into the 66th Avenue house. Every night before bedtime, Ashlee O. climbed into defendant's lap and hugged and kissed him goodnight. In October 2002, Ashlee O. crawled into defendant's lap to say goodnight. As Ashlee O. gave defendant a hug, defendant sucked on her neck for about 20 seconds, leaving a hickey. Ashlee O. was afraid to say anything.

The next morning, Audrey noticed the hickey. She asked Ashlee O., "Who did that to your neck?" Ashlee O. told her defendant had given her the hickey. Audrey immediately confronted defendant in private about it. He did not admit or deny causing the hickey. Audrey spoke to her church pastor about this incident. He convinced her that she and defendant should deal with it through their ongoing marital counseling with the pastor. Audrey instructed Ashlee O. and A.M. not to hug and kiss defendant goodnight

anymore. Defendant admitted to the church pastor during counseling that he had given Ashlee O. the hickey, but suggested that Audrey had misinterpreted it.

B. Defense Case

Defendant acknowledged prior drug convictions leading to a prison term in 1988, as well as a fight in 1997, which led to a battery conviction for injuring his daughter, N.F. Defendant was still on probation for the latter conviction at the time of his arrest. Defendant also admitted giving Ashlee O. the hickey, as she had testified. He explained that his daughters had a problem bathing. That evening, Ashlee O. told him to smell her neck. So he smelled her neck and kissed her, making a smacking sound. She laughed so he kissed her again until he left the mark.

Defendant often went into the children's bedroom at the 18th Avenue apartment to close the blinds or the closet door. On the night Audrey confronted him, he had been in the bathroom, not the children's room. Audrey told him she had a dream or a bad feeling A.M. had been touched; she explained that her first husband had touched her younger sister. Defendant denied molesting A.M., or touching her inappropriately at any time.

Defendant and Audrey had argued over money shortly before A.M. reported the alleged molestations. Audrey had threatened to call the police on him. To defendant's knowledge, A.M. had never previously called the church pastor to schedule an appointment.

By stipulation, a videotape of a multidisciplinary interview taken of A.M. about the alleged molestations was played for the jury. Contrary to her trial testimony, A.M. told the interviewer there was no touching of her vagina, only a touching of her inner thigh, although she was not positive about that. Aside from the first incident in the living room, she did not describe in detail any further incidents that occurred when she was 13. Contrary to her trial testimony, she stated that the oral copulations only occurred after they left the apartment.

A friend of A.M.'s, V.D., recalled a conversation that took place a year before A.M.'s report to the church pastor. A.M. told V.D. about only one incident in which she believed defendant touched her. A.M. told her she was not sure if it really happened

because she was asleep. She stated that she thought defendant might have licked her private part one time.

Defendant's daughter, N.F., testified that on more than one occasion in 2002, A.M. told her that she had been molested by her biological father several times. A.M. never told N.F. that defendant molested her. N.F. also testified that A.M. and her brother were scared of Audrey and that she had seen Audrey discipline the children physically, including whipping A.M. with a belt. Another biological daughter of defendant's, R.F., testified to the same effect.

The church pastor testified that defendant completed a church substance abuse program in exemplary fashion eight years earlier, and that defendant ended up being an ordained minister and a leader in the church.

C. Verdict and Sentencing

The jury found defendant guilty on all counts. Defendant admitted having suffered the four prior convictions and being on probation at the time he committed the charged offenses. The trial court sentenced defendant to a total of 18 years in state prison, consisting of the upper term of 16 years on count one, to be served consecutively to a two-year midterm sentence on count four. This timely appeal followed.

II. DISCUSSION

A. Penal Code Section 868.5

Ashlee O. and A.M. were each accompanied by a support person when they testified at trial. The trial court did not require the prosecution to make a preliminary showing of either witness's need for the support person. Although he made no objection to it at trial, defendant contends that this procedure violated his Sixth Amendment right to confrontation as well as his right to a fair trial.

Penal Code section 868.5 provides in relevant part: "Notwithstanding any other law, a prosecuting witness in a case involving a violation of Section . . . 288 [or] 288.5 . . . shall be entitled, for support, to the attendance of up to two persons of his or her own choosing . . . at the trial . . . during the testimony of the prosecuting witness. Only one of

those support persons may accompany the witness to the witness stand . . . ." (Pen. Code, § 868.5, subd. (a).)

The legal principles governing the use of a support person at trial were discussed in *People v. Lord* (1994) 30 Cal.App.4th 1718, 1721: "In *People v. Adams* (1993) 19 Cal.App.4th 412, the court rejected a constitutional challenge to California's support person statute, but held there must be a case-specific showing of necessity for support via an evidentiary hearing. The court found this necessity requirement in *Coy v. Iowa* (1988) 487 U.S. 1012, 1021, which required individualized findings of necessity to justify child testimony from behind a screen, and *Maryland v. Craig* (1990) 497 U.S. 836, 855–856, which required an evidentiary hearing to determine whether child testimony on one-way closed circuit television was necessary to protect the child. (*People v. Adams*, . . . at pp. 443–444.)"

In *People v. Lord*, another panel of this District held that the defendant waived the right to a necessity hearing by failing to request a hearing or to otherwise object to the support person's presence in the absence of such a hearing. (*People v. Lord*, *supra*, 30 Cal.App.4th at p. 1722.) We agree with the holding in *People v. Lord* and find it directly applicable to this case.

First, the courts have no sua sponte duty to insure that a showing of necessity is made. Contrary to defendant's suggestion, *Maryland v. Craig* does not hold to the contrary. The defendant in that case timely objected. (*Maryland v. Craig*, *supra*, 497 U.S. at p. 842.) Second, a necessity hearing cannot be persuasively analogized to the showing of foundational facts necessary to support the admissibility of evidence. (See, e.g., Evid. Code, §§ 402, 403, subd. (a) [proponent of proffered evidence has burden of producing evidence as to the existence of disputed preliminary fact].) The presence of a support person is a statutory right granted to the complaining witness, not an item of evidence one party seeks to introduce against another. A witness's request to exercise that right places no burden on the prosecution or the court in the absence of a request by the defense that the witness's necessity for a support person be shown.

Defendant's additional arguments against applying the waiver rule are without merit. He was not excused from objecting because the law is unsettled. The law is not unsettled as to whether a defendant may require some type of antecedent showing before a support person is allowed to accompany a witness. We also find nothing in the record to suggest that defendant was prevented from making a timely objection, that any such objection would have been futile, or that an objection would have necessarily exposed defendant to the risk of alienating the jury. He could have requested a bench conference to raise the issue, and he had ample warning to do so because a support person had also been present at the preliminary hearing.

By not objecting, defendant deprived the trial court of the opportunity to make an evidence-based finding as to the witnesses' need for a support person. (*People v. Lord*, *supra*, 30 Cal.App.4th at p. 1722.) He has therefore waived the issue. (*Ibid.*)

B. Admission of Officer Souza's Testimony

Oakland Police Officer Anthony Souza, who investigated A.M.'s molestation allegations, was called as a defense witness. On cross-examination by the prosecutor, Souza testified that he was assigned to the department's Special Victims Unit and was responsible for investigating cases involving sexual assaults and child sexual abuse. Without objection, Souza testified that child sexual abuse victims frequently do not provide all of the details about what occurred to them when they are initially interviewed. He explained that child victims are often very traumatized and know that the accusations they are making will severely affect their families. According to Souza, such children tend to be more willing to provide details and are better able to remember events after they have had more contact with law enforcement.

Defendant contends the trial court erred in allowing Souza to so testify absent any sufficient showing of his expert qualifications in this area. He points out that Officer Souza testified he had only been with the Special Victims Unit for six months, had received no prior training in child sexual abuse cases, and had only investigated 200 cases involving child sexual abuse.

Defendant waived his present claim by failing to raise it in the trial court. At the outset of her cross-examination, the prosecutor asked Souza how many child sexual assault cases he had investigated. Defendant objected on grounds of relevance. The prosecutor explained that defendant had raised an issue concerning the lack of detail in A.M.'s initial statements, and the prosecution wished to lay a foundation for Souza to explain why that might be the case. Defendant did not object to allowing Souza to testify on that subject, and did not object to Souza's qualifications to testify as he did. Defendant's failure to make a timely and specific objection on the ground now raised waives the objection. (*People v. Bolin* (1998) 18 Cal.4th 297, 321.)

In any event, defendant's belated objection is not well taken. The challenged testimony constituted general opinion testimony based on Officer Souza's own experiences with child abuse victims. It did not rise to the level of expert opinion testimony. Defendant's further claim—that the testimony was "closely akin" to expert testimony on rape trauma syndrome or child sexual abuse accommodation syndrome and therefore should have been accompanied by a limiting instruction—is also unpersuasive. Souza offered no expert testimony on either subject.

Defendant's ineffective assistance of counsel claim also falls short. To support such a claim, the record must establish that there was no possible tactical justification for trial counsel's failure to object. (See *People v. Majors* (1998) 18 Cal.4th 385, 403.) Here, the prosecution sought only to elicit general opinion testimony based on Souza's experiences with child victims. Counsel's failure to object to such testimony was not unreasonable per se. Furthermore, it is not reasonably probable that the trial court would have excluded the testimony, or that the outcome of the trial would have been more favorable to defendant, had such objection been made. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.)

C. Penal Code Section 288.5 Instructions

Defendant challenges the following instruction given to the jury concerning the continuous sexual abuse count of which he was convicted: "In the crime charged in Count One, Continuous Sexual Abuse of a Child and the crime of Battery, which is a

lesser crime, there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

The People concede that continuous sexual abuse is a specific intent crime when it is predicated, as it was in this case, on the theory that defendant committed three or more lewd or lascivious acts against a child under the age of 14.[1] However, any error in giving the above-quoted general intent instruction was in our view rendered harmless in light of the instructions as a whole and the manner in which the prosecution argued the case to the jury. In addition to the above-quoted instruction, the trial court also delivered a lengthier and more detailed instruction defining the terms used in section 288.5 and the elements required to prove defendant was guilty of violating it. The latter instruction explained that a "lewd or lascivious act" requires "the specific intent to arouse, appeal to, or gratify the sexual desires of either party." In her summation to the jury concerning count one, continuous sexual abuse, the prosecutor relied solely on the second instruction and made no reference to count one as a potential general intent crime. The only theory the prosecution advanced in connection with count one was that defendant committed three or more lewd or lascivious acts against A.M. The prosecutor explained that it was the People's burden to prove the requisite special intent in connection with each act A.M. described, and asked the jury to infer that intent from the nature of the acts themselves.

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[1] Penal Code section 288.5 provides in relevant part as follows: "Any person who . . . resides in the same home with the minor child . . . who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years . . . , or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years . . . is guilty of the offense of continuous sexual abuse of a child." The crime of committing a lewd or lascivious act against a child requires the specific intent of "arousing, appealing to, or gratifying the lust, passions, or sexual desires of [the defendant] or the child." (Pen. Code, § 288; *People v. Fox* (2001) 93 Cal.App.4th 394, 396–397.)

We perceive no reasonable likelihood that the jury convicted defendant of continuous sexual abuse based on a misimpression that the prosecution needed only to prove his general intent to do the acts alleged.

D. Failure to Give CALJIC No. 17.10

The trial court instructed on battery as a lesser included offense to all the charges. The court's instructions defined battery and specified that it was a lesser offense that the jury should consider on its verdict form if it found the defendant not guilty of the crime charged.[2] Defendant contends the trial court erred in failing to also instruct the jury under CALJIC No. 17.10 that it could convict defendant of the lesser offense if it was not satisfied beyond a reasonable doubt that he was guilty of the crimes charged.[3]

Viewed as a whole, the jury instructions made it clear that if the jury did not find each element of the charged offenses beyond a reasonable doubt, the jurors were then required to consider whether the elements of battery were proven beyond a reasonable doubt. In any event, any error in failing to give CALJIC No. 17.10 or a similar instruction was harmless. On the record before us, it is not reasonably probable that the jury would have returned a verdict of battery on any count had it received such an

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[2] The instructions given stated in relevant part: "If you find the defendant not guilty of the felony charged, you then need to complete the verdict on the lesser included offense by determining whether the defendant is guilty or not guilty of the lesser included crime . . . ."

[3] CALJIC No. 17.10 provides in relevant part: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] [The crime of _____ [as charged in Count _____] is lesser to that of _____ charged in Count _____.] [¶] . . . [¶] Thus, you are to determine whether . . . defendant . . . is . . . guilty or not guilty of the crime[s] charged [in Count[s] _____] or of any lesser crime[s]. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict[s]. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the [charged] [greater] crime."

instruction. It is apparent that the jury believed A.M.'s testimony regarding the five specific incidents. That testimony, combined with Ashlee O.'s testimony, defendant's admission that he caused Ashlee O.'s hickey, and the corroboration provided by A.M.'s mother, her friend, V.D., and her brother, all furnished considerable evidence of lewd acts and no evidence of simple battery. The verdict and judgment are not undermined by the trial court's failure to give CALJIC No. 17.10.

E. Use of CALJIC No. 2.21.2

Defendant contends the trial court erred in instructing the jury with CALJIC No. 2.21.2 concerning the truthfulness of witnesses.[4] He asserts that this instruction impermissibly lessens the People's burden of proof by allowing the jury to use a lesser "probability" standard to evaluate the witnesses' testimony.

We agree with the appellate court in *People v. Foster* (1995) 34 Cal.App.4th 766 that CALJIC No. 2.21.2 " ' "does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute." ' " (*Id.* at p. 775.) It was accompanied in this case by: (1) CALJIC No. 1.01, which instructed the jury to "[c]onsider the instructions as a whole, and each in light of all the others"; and (2) CALJIC No. 2.90, which defined "reasonable doubt" for the jury as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, of the truth of the charge." Considering the instructions as a whole, no reasonable juror would have construed CALJIC No. 2.21.2 to allow a guilty verdict on a finding that the defendant was probably guilty, rather than guilty beyond a reasonable doubt. (See *People v. Wade* (1995) 39 Cal.App.4th 1487, 1494.)

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[4] The trial court instructed the jury as follows under CALJIC No. 2.21.2: "A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

F. Cumulative Error

Any possible errors in the giving of an extraneous general intent instruction in reference to count one, or in failing to give CALJIC No. 17.10, were harmless whether considered individually or in combination. Finding no other potential errors to cumulate, we therefore reject defendant's argument that cumulative error deprived him of a fair trial or warrants reversal of the verdict in whole or in part.

G. No-Contact Order

The judgment sentencing defendant to state prison included the following no-contact orders: (1) "Defendant is to have no contact with minor/victim pursuant to Penal Code section 1202.05"; and (2) "Defendant prohibited all contact with minor females under age of 18." Defendant objects to the latter order. Conceding that such an order might be permissible as a condition of probation, he contends that it is unauthorized by statute and unconstitutional when imposed as a lifetime ban as part of a judgment sentencing him to state prison. Defendant points out that the prohibition appears to apply regardless of future circumstances or rehabilitation and that, unlike the no-contact rule required by section 1202.05, it lacks exceptions or provisions for modification.

The People argue unpersuasively that the subject order is authorized by Penal Code section 136.2. Section 136.2 authorizes any court with jurisdiction over a criminal matter which has a "good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur," to issue an order prohibiting the defendant from any "communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose." (Pen. Code, § 136.2, subd. (d).) In this case, the trial court made no finding that harm to or intimidation of a victim or witness was likely to occur. The prohibition it imposed on defendant—barring his contact with any female under the age of 18—sweeps far beyond the victims and witnesses involved in defendant's criminal proceeding. There is also authority that section 136.2 only authorizes trial courts to enter protective orders prior to or during trial, and that it has no application after the defendant has been convicted. (See *People v. Stone* (2004) 123 Cal.App.4th 153, 159–160.)

On these grounds, we find that the portion of the judgment prohibiting defendant from contact with females under the age of 18 was unauthorized by statute and in excess of the trial court's jurisdiction. Rather than strike the order, we will adopt defendant's proposal that it be recast as a visitation restriction. We decline the People's suggestion that the order be refashioned into a non-binding recommendation for a parole condition. Appropriate parole conditions should be determined by the Department of Corrections and Board of Prison Terms at the time of defendant's release.

H. Blakely Issue

Defendant claims that the trial court erred under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) in imposing the 16-year upper term of imprisonment for his Penal Code section 288.5, subdivision (a) violation based on facts that were neither found by the jury nor admitted by him.

Without reaching the question of whether defendant's constitutional rights pursuant to the *Blakely* opinion were violated, we find that he did not suffer prejudice from the imposition of the upper term upon him without a separate finding by the jury of aggravating circumstances beyond a reasonable doubt. We do not consider the denial of *Blakely* jury trial rights during sentencing proceedings to be a "structural defect," not amenable to harmless error review.[5] Under a harmless error analysis, we find that

[5] In *Arizona v. Fulminante* (1991) 499 U.S. 279, "a majority of the high court, in discussing the applicable harmless error standard for constitutional errors, distinguished 'trial error,' that is, an error which 'occur[s] during the presentation of the case to the jury,' from 'structural defects,' such as denial of a public trial, which 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.' The former errors are subject to *Chapman* analysis (see *Chapman v. California* (1967) 386 U.S. 18, 24 [error or deprivation must be shown harmless beyond reasonable doubt]), whereas the latter errors are deemed reversible per se." (*People v. Woodward* (1992) 4 Cal.4th 376, 387.) "There is a strong presumption any error falls within" the *Chapman* category, "and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People v. Marshall* (1996) 13 Cal.4th 799, 851.) "In only a few cases has the Supreme Court found a constitutional violation which is not subject to harmless error analysis." (*People v. Evans* (1998) 62 Cal.App.4th 186, 194.)

defendant would have been sentenced to the upper term even without the trial court's finding of any aggravating factors in violation of *Blakely*.

In *Blakely*, the United States Supreme Court applied the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that " '[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. at p. 2536, italics added.) Nothing in *Blakely* casts doubt on the exclusion of prior conviction allegations from the constitutional right to jury trial. The California Supreme Court has consistently held that neither the federal nor state constitutions confer the right to have a jury determine any factual issues relating to prior convictions alleged for purposes of sentencing enhancement. (See, e.g., *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Vera* (1997) 15 Cal.4th 269, 277; *People v. Wiley* (1995) 9 Cal.4th 580, 585.) The exception has been found to apply not only to the fact of a prior conviction, but to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) "Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself." (*People v. Thomas*, at pp. 221–222.)

Here, the defendant admitted that he had suffered four prior convictions, served two prior prison terms, and was on probation at the time he committed the charged sex crimes. The trial court additionally found as matters in aggravation that defendant's prior convictions as an adult were "numerous and of increasing seriousness," and that his "prior performance on probation and parole [were] unsatisfactory." In our view, these recidivist factors standing alone justified the trial court's selection of the upper term on count one. "California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term . . . ."

(*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) On the record before us, we are convinced beyond a reasonable doubt that the trial court would have imposed the upper term even without finding or considering any of the non-recidivist facts that might have required a jury trial under *Blakely*. Thus, even if some of the aggravating factors the trial court cited required jury findings under *Blakely*, its imposition of an upper term sentence was nonetheless constitutionally valid and not prejudicial to defendant.[6] (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263–1264; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1782–1783.)

III. DISPOSITION

We remand the matter with instructions that the abstract of judgment be amended to strike the order prohibiting defendant from contact with minor females under the age of 18 and substitute in its place a prohibition on any visitation with minor females under the age of 18. In all other respects, the judgment is affirmed.

_____
Margulies, J.

We concur:

_____
Stein, Acting P.J.

_____
Swager, J.

[6] The most recent Supreme Court case discussing the principles applied in *Blakely*, *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738], does not affect our analysis in this case.